



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

TRG

Docket No: 2032-99

14 February 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) Title 10 U.S.C. 1552
(b) SECNAVINST 7220.38E

Encl: (1) Case Summary
(3) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the United States Navy filed an application with this Board requesting, in effect, that his naval record be corrected by changing the reason for discharge or, in the alternative, that the record be corrected to show that the unearned portion of his Selective Reenlistment Bonus (SRB) was not recouped.

2. The Board, consisting of Mr. Dunn, Mr. Reid and Ms. Humberd, reviewed Petitioner's allegations of error and injustice on 23 February 1999 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application to the Board was filed in a timely manner.

c. Petitioner reenlisted in the Navy on 19 August 1993. At that time, he had completed almost six years of active service. The record shows that he was authorized an SRB of \$16,182. He was paid an initial installment of \$8,091 and was to be paid the remainder in annual installments of \$1,618.20.

e. Petitioner received nonjudicial punishment for possession of alcoholic beverages aboard ship on 2 November 1996. Subsequently, he was referred for a psychiatric evaluation because of "out of control anger exhibited by excessively beating

his girlfriends dog, almost to the point of death." The psychiatrist stated, in part, as follows:

During the session the (patient) discussed ongoing symptoms of irritability, thoughts and fantasies of harming his supervisor and anxiety specifically regarding his current relationship and possible transfer to Florida. ... Additionally, the patient elaborated on his previous history of antisocial behavior including cruelty to animals. The (patient) reported that as a child he tortured cats, and actually killed a cat with a martial arts weapon when he was in grade school. ...

The psychologist's assessment is as follows:

The patient appears to have a personality disorder which may seriously affect military performance in the future. Features of this personality disorder include, among others a pervasive distrust and suspiciousness of others, impulsivity, irritability and aggressiveness, and a lack of remorse.

The diagnosis was an unspecified personality disorder with antisocial and paranoid traits. The psychologist recommended expeditious separation since he thought Petitioner might behave unpredictably under stress and considered him a risk to harm himself or others if retained.

e. On 20 March 1997 Petitioner was notified of separation processing due to his commission of a serious offense (apparently based on the 2 November 1996 NJP), and due to the diagnosed personality disorder. He waived his right to an administrative discharge board conditioned upon the receipt of an honorable discharge due to the diagnosed personality disorder, a waiver of the obligation to repay his SRB, and one half separation pay. These conditions were agreed to by his command. Subsequently, the commanding officer directed an honorable discharge due to the diagnosed personality disorder. He was so discharged on 30 April 1997.

f. Sometime after discharge, Petitioner received a bill for the unearned portion of his SRB in the amount of \$6,744.68. This indebtedness was caused, in large part, by the initial payment of \$8,091. This indebtedness occurred because recoupment is required by law and the commanding officer had no authority to waive it. On 12 May 1998 the commanding officer wrote a letter to the Chief, Bureau of Naval Personnel requesting that the command's agreement be honored because recoupment would not be fair in light of the conditional waiver of the administrative

discharge board. In his letter, the commanding officer noted that Petitioner's wife was undergoing treatment for cancer which generated enormous medical bills and the cancer had recently returned. Accordingly, the commanding officer believed that requiring repayment of the unearned part of the bonus would be a hardship.

g. Reference (b) sets forth the criteria for remission or waiver of indebtedness or erroneous payments made to or on behalf of members and former members of the Naval service. This instruction implements Title 10 U.S.C. 6161 and 10 U.S.C. 2774. Waiver action based on 10 U.S.C. 2774 is precluded in this case since the payment was legal and proper when paid. However, under the provisions of 10 U.S.C. 6161 a remission of the indebtedness of an enlisted member on active duty is authorized provided the request for remission is approved by the Secretary of the Navy or a designee prior to the individual's honorable discharge.

h. The criteria for requesting such a remission of indebtedness are set forth in reference (b). That reference states that an investigation must be conducted into the facts and circumstances surrounding the request for remission. The reference also directs that active duty members be advised of their right to request remission consideration under the provisions of the reference immediately upon discovery of an overpayment. There is no indication in the record that Petitioner was ever advised as required. In this case, it was known that an indebtedness would occur when discharge was directed and the command agreed that in exchange for a waiver of the ADB, the unearned portion of the SRB would not be recouped.

i. The Board has recommended remission of indebtedness in other cases where there was some degree of hardship. In such cases, the Board did not recommend a change in the reason for discharge to hardship because such a change would result in the payment of all unpaid installments of the SRB. As indicated, this case is different because the discharge was based on an adverse psychiatric evaluation. In other such cases, the Board concluded that it was inappropriate to recoup the unearned SRB because the individuals could not continue to serve due to a condition over which they had no control-the diagnosed personality disorder.

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants partial favorable action. Concerning the request for a change in the reason for discharge, the Board is aware that changing the reason so that recoupment is not required would require the payment of

any unpaid installments in addition to precluding recoupment of the unearned portion of the SRB. The Board believes that such a windfall is not warranted in this case.

The Board notes, however, that Petitioner and the command were aware that recoupment would occur if he was discharged due to the diagnosed personality disorder and entered into an agreement to keep recoupment from happening. It appears that one of the factors considered by the command was the possibility of future large medical bills due to the wife's cancer. The Board believes that even if his case had been considered by an ADB that he would inevitably have been discharged. However, the Board also believes that the agreement not to recoup the SRB complicates the case. The Board notes that Petitioner was discharged based on a diagnosed personality disorder and it was not in the best interest of the Petitioner or the Navy to retain him on active duty. Given the conditional waiver to which the command agreed and since Petitioner was discharged because of a condition beyond his control, the Board concludes that remission of the indebtedness is appropriate.

Remission can be accomplished by showing that a request for remission of indebtedness was granted under the provisions of Title 10 U.S.C. 6161 and reference (b). Paragraph 7.a of reference (b) indicates that a decision on the request for remission must be made prior to discharge. Therefore, the Board concludes that the record should show that Petitioner's request for remission of indebtedness due to the SRB overpayment was approved by the Secretary of the Navy on 30 April 1997. The amount approved for remission should be \$6,744.68.

RECOMMENDATION:

- a. That Petitioner's naval record be corrected to show that he requested remission of his indebtedness and that this request was favorably endorsed by his commanding officer. The amount recommended for remission is \$6,744.68.
- b. That Petitioner's record be further corrected to show that the request for remission was approved by the Secretary of the Navy on 30 April 1997, the day of his discharge.
- c. That this Report of Proceedings constitute the report of investigation or written report required by reference (b), and the Report of Proceedings be forwarded to the Defense Finance and Accounting Service for implementation under the provisions of the regulations.
- d. That Petitioner's request for a change in the reason for his discharge be denied.

e. That this Report of Proceedings be filed in Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder


ALAN E. GOLDSMITH
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.


W. DEAN PFEIFFER

Reviewed and approved:

MAR 3 2000



Charles L. Tompkins
Deputy Assistant Secretary of the Navy
(Personnel Programs)